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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SAMSON TUG AND BARGE CO., INC., an
Alaska Corporation } Civil No. A03-006 CV
Plaintiff/Appellant } IN ADMIRALTY
v. }
UNITED STATES OF AMERICA, } NOTICE OF AND MOTIONS
acting by and through } IN LIMINE, WITH SUPPORTING
the UNITED STATES DEPARTMENT of the } MEMORANDUM, BY DEFENDANT,
NAVY MILITARY SEALIFT COMMAND, } UNITED STATES OF AMERICA, TO
and UNITED STATES DEPARTMENT OF } EXCLUDE AND/OR LIMIT
THE ARMY MILITARY TRAFFIC } CERTAIN TRIAL TESTIMONY BY
MANAGEMENT COMMAND } PLAINTIFF
Defendants/Appellees }

Pursuant to this Court's order, defendant United States of America, hereby moves to

UNITED STATES OF AMERICA'S MOTIONS
IN LIMINE REGARDING WITNESSES

1 exclude and/or limit certain anticipated testimony by witnesses expected to be called by
 2 plaintiff Samson at the trial of this long pending case. Because the parties have not yet met
 3 to discuss nor have they prepared their submissions in advance of trial, which will commence
 4 on September 30, 2008, the United States must reserve its right to bring additional motions
 5 *in limine* until such time as plaintiff reveals its trial presentation intentions more specifically.
 6 Nevertheless, based on the record to date, the United States suggests that certain issues
 7 regarding the testimony of witnesses expected to testify on behalf of plaintiff appear at this
 8 time to require resolution in advance of trial.

9 This motion is based on the Memorandum which follows, the Exhibits attached
 10 hereto, the Declaration of Jeanne M. Franken submitted in support hereof, and the entire file
 11 of the Court. A proposed form of Order is also being submitted.

12 I. Witnesses who were not disclosed in a timely fashion by plaintiff Samson should
 13 be excluded.

14 This case has been pending for over five years. At issue is a Government contract for
 15 ocean transportation to and from Adak Island by plaintiff Samson's barge service in the years
 16 1995-1997, a period more than ten years ago. Over the course of this lengthy litigation, the
 17 parties respectfully sought and were granted numerous extensions in the applicable pretrial
 18 schedule, including in the date for them to disclose the names of trial witnesses, to disclose
 19 experts, and to file their expert reports.

20 Plaintiff Samson failed to submit a trial witness list until the last of the deadlines on
 21 April 27, 2007, whereas the United States had filed at least seven such witness disclosures
 22 during the years when discovery was open. On November 26, 2007, about seven months
 23 after the last of the deadlines for submission of witness lists, counsel for plaintiff Samson
 24 filed and served another list in which it purported to name some additional trial witnesses.
 25 Government counsel then reminded plaintiff's counsel that this attempt to supplement its list
 26 was extremely tardy; inquired about what the substance of the new witnesses' testimony
 27 would be, without a response; and advised that her intent was to move to exclude those
 28 witnessses who had not been timely disclosed by plaintiff. (See the Franken Declaration.)

1 Samson took no action.

2 To allow witnesses to testify for plaintiff who were not properly and timely disclosed
 3 by it would run counter to the disclosure requirements of the Federal Rules of Civil
 4 Procedure, the Local Rules of Court and this Court's orders, and would be prejudicial to the
 5 Government. Witnesses not identified in a timely fashion should be excluded.

6 II. Testimony by witnesses on subjects for which plaintiff Samson failed to produce
 7 a witness in response to a properly noticed and convened deposition pursuant to
Fed.R.Civ.Pro.30(b)(6) should be excluded.

8 On June 29, 2007, the United States served plaintiff Samson with a notice pursuant
 9 to Fed.R.Civ.Pro. 30(b)(6), requesting that one or more witnesses be produced a month later
 10 on July 27, 2007, to testify on its behalf on the factual bases for the following of Samson's
 11 contentions: that a diversion of what it calls "contract cargo" actually occurred; that the
 12 alleged diversion was to air carriage; that the Government had supposedly agreed to ship "all
 13 military and military sponsored cargo" with Samson; that Samson was entitled to attorneys'
 14 fees; the amount of Samson's fees and costs; and that the Government's denial of Samson's
 15 claim was baseless. (See the Franken Declaration and Exhibit "A" submitted in support
 16 hereof.) Plaintiff did not communicate a conflict with the date, and did not seek to postpone
 17 or reschedule the 30(b)(6) deposition; neither did it seek a protective order to stop the
 18 deposition, which Government counsel advised would otherwise proceed. Government
 19 counsel did convene the deposition on the date and at the time and place noticed, but no
 20 witness appeared to speak for plaintiff Samson on the subjects set forth in the notice. (See
 21 the Franken Declaration and Exhibit "B".) The United States, therefore, seeks to prevent
 22 testimony by plaintiff's witnesses at trial on the aforesaid subjects, as specified in the
 23 properly served notice.

24 III. Plaintiff's proposed damage expert George Johnson should not be permitted to
testify beyond the scope of his alleged expertise, nor to render opinions contained in a report
he produced after expiration of the last of the many deadlines set for submission of expert
reports.

1 The final deadline for filing and exchanging expert reports expired on July 20, 2007.
 2 (See the Order of July 12, 2007, setting the deadline for the filing of expert reports, Docket
 3 No. 61.) The United States met that deadline and timely filed and produced its expert report.
 4 (See Docket No. 62.) Plaintiff Samson did not file the first report of its designated expert,
 5 George Johnson, but did serve it on the United States prior to the deadlines, and Samson
 6 subsequently revised its report, but again did not file it. Significantly after the deadline for
 7 submission of expert reports, in November of 2007, counsel for plaintiff Samson produced
 8 a further “supplemental” expert report in which it raised completely new issues and opinions
 9 concerning the carriage of air cargo. Samson has not filed any of its expert reports with the
 10 Court, contrary to the Court’s orders.

11 Although the Government was permitted to depose Mr. Johnson a second time with
 12 regard to his untimely third report, it had no opportunity to obtain appropriate expertise to
 13 challenge the new opinions he stated therein, and consequently would be prejudiced were he
 14 permitted to testify on these additional matters in contravention of the Court’s deadlines.

15 Moreover, the Government questions whether Mr. Johnson, a certified public
 16 accountant, has the required bona fides to arrive at the conclusions he advances in this very
 17 late provided, “supplemental” report. Specifically, the United States submits that his
 18 proposed testimony regarding the asserted carriage of cargo by air to and from Adak, and the
 19 interpretation of military documentation pertaining thereto, cannot pass muster under the
 20 “gatekeeping” requirements placed on the Court by Rule 702 of the Federal Rules of
 21 Evidence and attendant Supreme Court precedent, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), *upon remand*, 43 F.3d 1311,
 22 1316 (9th Cir. 1995) (*Daubert II*), *cert. denied*, 516 U.S. 869, 116 S.Ct. 189. 133 L.Ed.2d
 23 126 (1995). The United States suggests that those portions of his proposed trial testimony and
 24 the entirety of his last report, should be excluded on this basis under *Daubert* principles, in
 25 addition to being untimely and submitted in violation of the Court’s orders.

26 Clearly, plaintiff Samson has the burden of establishing, by a preponderance of proof,
 27 both the **qualifications** of its expert witness and the **admissibility** of his proffered evidence.

1 || *Daubert*, *supra* at 592, fn. 10, citing Fed.R.Evid. 104(a) and *Bourjaily v. United States*, 483
 2 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). The qualifications of purported experts
 3 are part and parcel of the *Daubert* inquiry:

4 [A]n expert's qualifications bear upon the scientific validity of his
 5 testimony...'An expert's opinion is helpful only to the extent the expert
 6 draws on some special skill, knowledge, or experience to formulate that
 7 opinion; the opinion must be an expert opinion (that is, an opinion
 8 informed by the witness' expertise) rather than simply an opinion
 9 broached by a purported expert.'...

10 *United States v. Vitek Supply Corp.*, 144 F.3d 476, 486 (7th Cir. 1998) (citations omitted),
 11 cert. denied, 525 U.S. 1138, 119 S.Ct. 1026, 143 L.Ed.2d 37 (1999).

12 And just because a witness might qualify as an expert on some subjects, does not
 13 mean he can testify in other fields in which he is totally devoid of appropriate qualifications.
 14 *See, e.g., United States v. Chang*, 207 F.3d 1169 (9th Cir. 2000); *Wilson v. Woods*, 163 F.3d
 15 935 (5th Cir. 1999); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375 (5th Cir. 1996). Federal
 16 Rule of Evidence 702 states:

17 If scientific, technical, or other specialized knowledge will assist
 18 the trier of fact to understand the evidence or to determine a fact
 19 in issue, a witness qualified as an expert by knowledge, skill,
 20 experience, training, or education, may testify thereto in the
 21 form of an opinion or otherwise, if (1) the testimony is based
 22 upon sufficient facts or data, (2) the testimony is the product of
 23 reliable principles and methods, and (3) the witness has applied
 24 the principles and methods reliably to the facts of the case.

25 In *Daubert*, *supra*, the Supreme Court emphasized that under Rule 702, the subject of
 26 an expert's testimony must be **scientific** knowledge. *Id.* at 589-90(emphasis added). The
 27 Court explained that this requirement is embodied in the Rule's very words; "scientific"
 28 implies a grounding in the methods and procedures of science, and "knowledge" connotes
 1 more than a subjective belief or an unsupported speculation. *Id.* at 590. Therefore, in order
 2 to qualify as "scientific knowledge," an expert's inference or assertion must be derived by
 3 using the scientific method, and an expert's testimony is not admissible unless "the reasoning
 4 or methodology underlying the testimony is scientifically valid". *Id.* at 592-93. *Daubert* thus

1 clearly imposes an obligation on a trial judge to ensure that scientific testimony is reliable,
 2 as well as relevant. *Id.* at 589. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct.
 3 1167, 143 L.Ed.2d 238 (1999), the Supreme Court resolved post-*Daubert* conflicts in the
 4 lower courts and held that the gatekeeper function applied to **all** expert testimony.

5 The question that needs to be answered here is whether plaintiff's accountant Mr.
 6 Johnson analyzed the subject of the carriage of cargo by air to and from Adak Island with the
 7 same intellectual rigor and precision one would expect from an actual expert in that field,
 8 using an established, generally accepted and tested methodology. The clear answer is no.

9 A cursory review of Mr. Johnson's resume reveals he could not have done so since
 10 he lacks the minimum qualifications, whether by education, experience, service or
 11 employment, to perform such an assessment, a fact he apparently admits. (See the Franken
 12 Declaration and Exhibits "C" and "D", wherein at marked page 48 he responds "No" when
 13 asked if he is an expert on the carriage of cargo by air.) He did not follow any methodology
 14 at all, let alone a verifiable and scientifically accepted one, for arriving at his conclusions
 15 regarding the air cargo. (See the Franken Declaration and Exhibit "D".) Consequently, the
 16 Government contends all testimony on the carriage of air cargo by Mr. Johnson must be
 17 excluded, and plaintiff should be precluded from introducing his tardy and defective
 18 "supplemental" report in its entirety. (The Government must reserve its right to raise
 19 *Daubert* and other issues with regard to his remaining testimony on damages at the time it
 20 briefs the case for trial.)

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CONCLUSION

For the foregoing reasons, the motions *in limine* of defendant United States of America should be granted, and plaintiff's trial presentation limited accordingly.

Respectfully submitted,

Dated: March 31, 2008

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s/Jeanne M. Franken

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 31, 2008, a copy of the foregoing UNITED STATES OF AMERICA'S NOTICE OF AND MOTIONS IN LIMINE, WITH MEMORANDUM, was served electronically on:

Richard D. Gluck, Esq.
Garvey Schubert Barer

William G. Royce, Esq.
Law Office of William G. Royce

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Samson Tug and Barge Company, Inc.

s/Jeanne M. Franken

JEANNE M. FRANKEN